SELECTED GUIDELINE APPLICATION DECISIONS FOR THE TENTH CIRCUIT

Prepared by the
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Table of Contents

Page

Table of Authorities

Page

U.S. SENTENCING COMMISSION GUIDELINES MANUAL CASE ANNOTATIONS — TENTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.3 Relevant Conduct

United States v. Lacy, 2001 WL 640941 (10th Cir. May 31, 2001). The district court did not err in finding that the defendant was responsible not only for the cocaine base he possessed individually but also for the cocaine base possessed by the codefendant as a part of the common scheme to possess and distribute cocaine base. On appeal, the defendant challenged the inclusion of the cocaine base found in the codefendant's radio because the government failed to show that he exercised any actual or constructive control over those drugs. The record reflected that both defendants, who were brothers, were involved in a common scheme to possess and distribute cocaine base. They bought tickets together, traveled together, and shared a room. The Tenth Circuit held that the district court had ample evidence to find that the drug quantity the codefendant possessed, in addition to what the defendant individually possessed, was a part of a common scheme.

United States v. Keifer, 198 F.3d 798 (10th Cir. 1999). The district court erred in including the Pennsylvania state charges as relevant conduct to calculate the loss without any evidentiary support for inclusion. The district court did not err in including the Virginia state prior conviction in the criminal history calculations under §4A1.2(a)(1). The defendant was convicted of six counts of bank fraud and one count of using a false social security number. At sentencing the district court counted the prior Virginia conviction as criminal history rather than relevant conduct. In calculating the loss the district court relied upon $130,238.80 associated with pending Pennsylvania fraud and forgery charges. The defendant objected, arguing that that amount was speculative because he had not been convicted of the Pennsylvania charges and was unaware of the evidentiary support for them. He also objected to the imposition of two criminal history points based on his Virginia conviction for forging a public document. Both objections were overruled. On appeal, the Tenth Circuit agreed and held that on remand for resentencing the government could introduce new evidence regarding the pending Pennsylvania charges in determining the relevant loss conduct. It also held that "because the conviction for fraudulently obtaining a driver's license did not involve the same type of monetary harm as the defendant's other conduct, it is properly considered as part of his criminal history." *Id*. at 802. *See also* United States v. Keeling, 235 F.3d 533, 535 (10th Cir. 2000) (held that it remains true after Apprendi that it is for the sentencing court, not the jury, to determine relevant conduct, provided that an enhanced penalty based upon additional relevant conduct quantity does not exceed the statutory range authorized by the count of conviction).

United States v. Bolden, 132 F.3d 1353 (10th Cir. 1997). The defendant's accomplice's possession of a firearm in an attempted bank robbery could be attributed to the defendant, despite the fact that the accomplice was actually a government informant, where it could be demonstrated

that the defendant intended that the accomplice use the firearm during the robbery and encouraged such use.

United States v. Melton, 131 F.3d 1400 (10th Cir. 1997). Acts of co-conspirators in a drug conspiracy that occurred after the defendant's arrest, including conduct associated with a government reverse sting operation, could not be attributed to the defendant under the sentencing guidelines. Because the defendant's participation in the conspiracy ended with his arrest, the scope of criminal activity which he had agreed to undertake did not include activities which post-dated his arrest.

United States v. Morales, 108 F.3d 1213 (10th Cir. 1997). On appeal by the government, the appellate court found no error in sentencing the defendant pursuant to the money laundering guideline range. The government argued that 21 U.S.C. §§ 841(b)(1)(A) and 846 (1994) required the court to sentence Morales to the mandatory minimum sentence of ten years in prison for his conviction of conspiracy. The statute provides for a mandatory minimum sentence of ten years for any defendant convicted of a conspiracy to distribute at least five kilograms of cocaine or at least 1,000 kilograms of marijuana. Under §1B1.3(a), relevant conduct for sentencing purposes is assessed on the basis of all acts and omissions committed, aided, and abetted by the defendant and in the case of jointly undertaken criminal activity, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. The district court determined that the defendant was involved in the laundering of drug profits in the amount of $831,514. However, the court determined the mandatory minimum sentence under the statute was inapplicable because the defendant's conduct did not establish a quantity of narcotics reasonably foreseeable to him. The government argued that the court erroneously applied the reasonably foreseeable standard and that the trial court erred by failing to determine that the defendant was directly involved with at least five kilograms of cocaine. The appellate court disagreed, and held that where a sentencing court determines a defendant was directly involved in the distribution of a quantity of drugs sufficient to invoke a mandatory minimum sentence, the quantity of drugs reasonably foreseeable to the defendant was irrelevant. Moreover, in the instant case, there was no evidence that the defendant was ever present at the scene of any illicit drug transaction. The government's evidence at trial simply establishes that the defendant was involved in the drug organization as a money launderer. Additionally, the appellate court noted that a trial court is not obligated to convert the total amount of money the defendant laundered from drug profits into its value in cocaine especially since the government did not allege that the defendant had any knowledge of the occurrence of a single drug transaction.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Dorrough, 84 F.3d 1309 (10th Cir.), *cert. denied*, 117 S. Ct. 446 (1996). The court did not err in refusing to apply retroactively the amended definition of "mixture" as provided by Amendment 484 to §2D1.1 commentary. The amendment reflected a change in the calculation of drug amounts for sentencing purposes based upon "the entire weight of any mixture or substance containing a detectable amount of the controlled substance" to a calculation based upon a definition of "mixture" which "does not include materials that must be separated from the controlled substance before the substance can be used." §2D1.1(c)(A), comment. (n.1). The court upheld the defendant's sentence because the retroactive application of amendment 484 is within the

discretion of the court upon consideration of the following factors: 1) the nature of the offense and the characteristics of the defendant, 2) the need for the sentence imposed, 3) the kinds of sentences available, 4) the applicable guidelines sentencing range, 5) any relevant Sentencing Commission policy statement, 6) the need to avoid sentencing disparity among defendants, and 7) the need to provide restitution to victims. The court deferred to the sentencing court's findings that the guidelines take into account a percentage of waste in PCP as evidenced by a sizeable decrease in the drug equivalency ratios and that using alternative sentencing under §2D1.1 would result in the same offense level in finding that the sentencing court did not abuse its discretion in imposing the sentence.

§1B1.11 Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

Ex Post Facto

United States v. Sullivan, 245 F.3d 1248 (10th Cir. 2001). The district court erred when it applied §1B1.11(b)(3) to the pre-amendment conduct because it violated the *ex post facto* clause. The defendant was convicted of three counts of willful failure to file a tax return in violation of 26 U.S.C. § 7203. The defendant was sentenced pursuant to the Sentencing Guidelines in effect at the time of sentencing although the applicable tax offense guidelines had been amended after the defendant had committed two of the three counts of willful failure to file a tax return. On appeal the defendant argued that the application of the post-amendment guidelines to all three counts violated the *ex post facto* clause because it resulted in a higher guideline range than would the application of the pre-amendment guidelines to all three counts, or the pre-amendment guidelines to the pre-amendment counts and the post-amendment guidelines to the post-amendment count. Under the pre-amendment guidelines the defendant's total offense level was 15 but under the post-amendment guidelines it was 19, thereby subjecting the defendant to a higher sentencing range. Relying on the Third[1] and Ninth[2] Circuits, the court held that the application of §1B1.11(b)(3) to the first two of the defendant's willful failure to file tax counts violated the *ex post facto* clause and was plain error. Defendant's sentence was vacated and remanded for resentencing.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

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[1] United States v. Bertoli, 40 F.3d 1384, 1407 (3d Cir. 1994)(when *ex post facto* concerns arise, the sentencing court can apply the one-book rule without violating the *ex post facto* clause by applying the pre-amendment guidelines to all counts).

[2] United States v. Ortland, 109 F.3d 539, 550 (9th Cir. 1997) (the district court must apply the pre-amendment guidelines to the counts involving conduct occurring prior to the amendment, and the post-amendment guidelines to conduct occurring after the amendment because the application of §1B1.11(b)(3) to sentence all of defendant's counts under the amended guideline would violate the *ex post facto* clause).

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Cryar, 232 F.3d 1318 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1423 (2001). The district court did not err when it calculated the defendant's offense level under §2A3.1 instead of §2X1.1 for Attempts. The defendant pled guilty to transporting child pornography and was convicted of attempted sexual abuse. On appeal the defendant challenged the application of §2A3.1(b) and argued that the applicable guideline should be §2X1.1. The defendant stated that 18 U.S.C. § 2241(c) criminalizes behavior at the point in time of the crossing of the State line and, at the time he crossed, he made no attempt to engage in a sexual act with a child. The Tenth Circuit however held that the defendant was not convicted of crossing state lines while holding impure thoughts, but rather he was convicted of the crossing of state lines with the intent to engage or attempt to engage in a sexual act with a person under the age of twelve.

Part B Offenses Involving Property

§2B3.1 Robbery

United States v. Arevalo, 242 F.3d 925 (10th Cir. 2001). The district court did not err in imposing a two-point enhancement under §2B3.1(b)(2)(F) for making a death threat. The defendant pled guilty to two counts of bank robbery. In calculating the defendant's sentence, the district court determined that the notes the defendant handed to the tellers constituted "threats of death" and included a two-point enhancement in the defendant's base offense level under §2B3.1(b)(2)(F). On appeal the court found that the defendant's two statements "I have a gun" and "If you do what I say, you will live" inferred that failure to comply with the defendant's instructions would result in death and held that the note containing these statements justified the sentence enhancement under §2B3.1(b)(2)(F). *See also* United States v. Pearson, 211 F.3d 524, 527 (10th Cir. 2000) (held that no impermissable double counting occurred because of the two-level enhancements for use of a firearm under §2B3.1(b)(2)(B) and for physical restraint with a gun during a robbery under §2B3.1(b)(4)(B) involved two distinct acts and punished two distinct harms).

United States v. Metzger, 233 F.3d 1226 (10th Cir. 2000). The district court did not err in applying the bodily injury enhancement under §2B3.1(b)(3)(B) to increase a defendant's sentence where the relevant injury was inflicted by a police officer. The defendant was convicted of robbery of a credit union during which a police officer shot a driver in the parking lot whom he believed to be the perpetrator, but was determined not to be the perpetrator. On appeal, the defendant argued that the four-level enhancement under §2B3.1(b)(3)(B) for the injury to the victim was improper because the injury was not a reasonably foreseeable result of the defendant's criminal conduct. The Tenth Circuit disagreed and found that under §1B1.3(a)(1)(A) and (a)(3), the victim's injury was attributable to the defendant's conduct because the harm that resulted from the acts and omissions were committed, induced, and willfully caused by the defendant. *Id*. at 1227. The court found that the victim's injury was a reasonably foreseeable result of the defendant's conduct because the defendant robbed a police credit union. The court held that it was reasonably foreseeable that a police officer conducting personal business at the bank might pursue the defendant and that the officer might act on reports from witnesses without taking the time to verify the information. *Id*. at 1228. *See* United States v. Malone, 222 F.3d 1286, 1296 (10th Cir.

2000) (held that the district court's conclusion to apply the four-level enhancement under §2B3.1(b)(4)(A) based on the defendant's abduction of the victim to facilitate the commission of the carjacking was not plain error).

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

United States v. Bruce, 78 F.3d 1506 (10th Cir.), *cert. denied*, 117 S. Ct. 149 (1996). In considering an issue of first impression, the circuit court held that application of a five-level enhancement under §2B3.2(b)(3)(A)(iii) was warranted where defendant possessed weapons at home when he mailed an extortion letter threatening their use. With no guidance as to the meaning of "possession" in the §2B3.2 context, the district court enhanced defendant's sentence based on the fact that the weapons were in defendant's possession when he mailed the threatening notes. The defendant contended that the enhancement was intended to apply only when the victim believes the extortionist has a weapon or when there is a risk, due to potential use of a weapon, to law enforcement personnel. The facts show that defendant admitted to possessing the weapons prior to his arrest and the police found weapons in defendant's home upon searching it. Noting the district court's finding that the defendant possessed weapons at the time he wrote the letters, the circuit court held that this case "demonstrates why such an enhancement is warranted." *Id*. at 1510. The circuit court went on to state that the defendant's weapons possession demonstrated that defendant was prepared to follow through with his threats if his monetary demands were not met.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses). Attempt or Conspiracy

United States v. Asch, 207 F.3d 1238 (10th Cir. 2000). Drugs possessed for personal consumption cannot be considered when determining the Sentencing Guidelines range or the statutory sentencing range.

United States v. Decker, 55 F.3d 1509 (10th Cir. 1995). The district court did not err in treating 100 percent pure d,1-methamphetamine as "methamphetamine (actual)" under the sentencing guidelines. The defendant was convicted for manufacturing a substance consisting of both d,1-methamphetamine and d-methamphetamine. Both substances are isomers of each other, with d,1-methamphetamine having a relatively lower potency. The defendant argued on appeal that his sentence, which was identical to one that he would have received for manufacturing pure d-methamphetamine instead of a mixture, was erroneously calculated and was contrary to the Sentencing Commission's intent to punish more severely those who manufacture either more drugs or more potent drugs. The circuit court ruled that the district court correctly treated pure d,1-methamphetamine as "methamphetamine (actual)" for sentencing purposes. The circuit court discussed the rulings of the Eleventh and Third Circuits on this issue. In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), *cert. denied*, 510 U.S. 1183 (1995), the Eleventh Circuit held that the term "methamphetamine (actual)" refers to the relative purity of the methamphetamine and does not refer to a particular form of the methamphetamine. In United States v. Bogusz, 43 F.3d 82 (3d Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995), the Third Circuit agreed that the term "methamphetamine (actual)" refers to the amount of pure illegal product, but disagreed slightly and

held that references to "methamphetamine" and "methamphetamine (actual)" in the drug quantity table of §2D1.1(c) refer solely to pure quantities of d-methamphetamine and that in order to calculate a base offense level for d,1-methamphetamine, the substances in question must be converted into its marijuana equivalency. The circuit court recognized the different methods of manufacturing methamphetamine and ruled that the district court correctly calculated the defendant's sentence. Paragraph five in the Application Notes following §2D1.1 directs the court to include all salts, isomers and all salts of isomers in calculating the weight of any given controlled substances thereby precluding the defendant's argument that "methamphetamine (actual)" refers only to pure d-methamphetamine. Furthermore, the guidelines instruct courts to assign the weight of the entire mixture of substance to the controlled substance that results in the greater offense level when the mixture consists of more than one controlled substance, thereby precluding the defendant's claim that his base offense level should have been determined by combining the calculated marijuana equivalents of the amounts of d,1-methamphetamine and d-methamphetamine in the substance.

United States v. Richards, 87 F.3d 1152 (10th Cir.), *cert. denied*, 117 S. Ct. 540 (1996). The Tenth Circuit, en banc, reversed the decision of the district court. On the government's appeal, the court held that the Sentencing Commission's amendment to §2D1.1, comment. (n.1), defining "mixture or substance" to exclude materials such as liquid by-products which must be separated from a controlled substance before it is used, did not alter the definition of "mixture or substance" for purposes of applying the statutory minimum sentence under 21 U.S.C. § 841. The Supreme Court's decision in Chapman v. United States, 500 U.S. 453 (1991) controls. That decision held that the words "mixture or substance" had to be given their plain meaning for purposes of 21 U.S.C. § 841. "Applying the plain meaning of `mixture,' the methamphetamine and liquid by-products the defendant possessed constitute 'two substances blended together so that the particles of one are diffused among the particles of the other.'" Chapman, 500 U.S. at 462 (citing 9 Oxford English Dictionary 921 (2d ed. 1989)). The defendant must be sentenced based upon the 32 kilogram weight of the methamphetamine and its liquid by-products, rather than the 28 kilograms of pure methamphetamine.

United States v. Silvers, 84 F.3d 1317 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 742 (1997). The district court did not err in sentencing the defendant, who pled guilty to possession with the intent to distribute marijuana, to a mandatory minimum sentence under 21 U.S.C. § 841 based on the number of marijuana plants as opposed to the weight of the marijuana. The circuit court rejected the defendant's first argument that he should not be sentenced based on the number of marijuana plants unless the government proved by a preponderance of the evidence that the defendant was the grower of the marijuana. In addition to the fact that the statutory language of 21 U.S.C. § 841 is unambiguous, the court finds that the legislative purpose behind the statute, which is to punish growers more harshly, "does not mandate [ ] that the government must prove the defendant was a grower before that equivalency can be applied." *Id*. at 1323. If Congress had so intended, it could have inserted such language into the text of the statute. Further, the U.S. Sentencing Guidelines do not seem to require anything beyond the proof of the quantity of marijuana. The circuit court rejected the defendant's second argument that in order to impose the mandatory minimum sentence the government must not only meet the definition of plant as an "organism having leaves and a readily observable root formation," but also show that the plant in question is alive. *Id*. at 1326. The court found nothing in the language or legislative history of 21

U.S.C. § 841 to support such a requirement. To the contrary, the legislative history of that statute indicates an intent "to simplify, not to complicate, the method of determining the high end or low end mandatory sentences." *Id*. Therefore, to add requirements to the plain meaning of the statute would undermine the legislative intent. The circuit court rejected the defendant's third argument that the district court erred in attributing 1000 marijuana plants to him for sentencing purposes. Giving deference to the district court's credibility determinations, the circuit court finds no clear error in the finding of factual support for the existence of 1000 plants.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

United States v. Lewis, 240 F. 3d 866 (10th Cir. 2001). The district court did not err in its calculation of loss under §2F1.1 by including the value of the elk intended to be killed, along with the value of the other elk actually killed. The defendant was convicted of violating the Lacy Act, in connection with a commercial elk hunting venture that he ran from his 320-acre tract of property located adjacent to wildlife refuge. The defendant lured the elk on to his tract of land to make the elk available for elk hunting with 6x6 bulls guaranteed for $7500.00 that he advertised in a local newspaper. A hunter who responded to the ad shot one of the defendant's elk and returned home with the elk's carcass. At sentencing, the defendant challenged the calculation of loss that was based on death of one elk actually killed and another elk intended to be killed because there was no evidence that the defendant entered or intended to enter into an agreement with the undercover Fish and Wildlife agent to kill the second elk. On appeal the court, relying on the testimony of the Fish and Wildlife agent, found that the district court reasonably concluded that the defendant intended to cause the killing of the second elk and as such its value should be included in the calculation of loss in the defendant's case. *See also* United States v. Nichols, 229 F.3d 975, 982 (10th Cir. 2000) (entire amount of bad checks written on an account acquired by using a false social security number can be considered in calculating the loss, even though the bank recovered some of the losses). *See* United States v. Archuletta, 231 F.3d 682, 685 (10th Cir. 2000) (holding that the enhancement under §2F1.1(b)(2) for more than minimal planning was designed to target criminals who engage in complicated criminal activity because their actions were considered more blame worthy and deserving of greater punishment than a perpetrator of a simple version of the crime).

United States v. Banta, 127 F.3d 982 (10th Cir. 1997). The defendant was properly held responsible for the value of vehicles obtained through bank fraud despite the fact that the vehicles were ultimately recovered. The defendant's conduct in furnishing to the bank a false address and telephone number and his failure to make even one payment were reasonably seen by the district court as evidence of the defendant's intent to permanently deprive the bank of the vehicles.

United States v. Janusz, 135 F.3d 1319 (10th Cir. 1998). The district court properly refused to give the defendant credit against loss calculation for sums victims ultimately recouped from third parties. Because the defendant did nothing to aid these recoupments by the victims, the sums recovered from the third parties could not reduce the defendant's culpability.

United States v. Knox, 124 F.3d 1360 (10th Cir. 1997). The amount of pecuniary loss attributable to a defendant in a mail fraud scheme is the totality of actual losses caused by the scheme. The fact that the defendant did not actually receive an amount of money equivalent to the loss caused by the scheme did not preclude such sums from being attributable to him as long as they were caused by the reasonably foreseeable acts of his co-conspirators.

United States v. Moore, 55 F.3d 1500 (10th Cir. 1995). The defendant was convicted of aiding and abetting credit card fraud. The government sought a five-level enhancement under the fraud guideline, §2F1.1, based on the amount of loss involved. The $40,000 loss amount included the market value of two abandoned rental cars and the rented truck driven at the time of apprehension. The district court based the loss amount on §2F1.1, comment. (n.7), which states that if the intended loss was greater than the actual loss inflicted, the intended amount should be used. The commentary refers to the calculation of loss under the larceny guideline, at §2B1.1, and at §2B1.1, comment. (n.2), the commentary explains that where "a defendant is apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately." The appellate court found "the district court's reliance upon the commentary to §2B1.1 inconsistent with our cases interpreting §2F1.1." *Id*. at 1502. Because "the government presented no evidence of actual losses sustained by the owners of the rented vehicles," the district court on remand must make additional findings and determine whether the defendant "intended to inflict a loss that included the entire fair market value of each of the rented vehicles." *Id*. at 1503.

Part J Offenses Involving the Administration of Justice

§2J1.3 Perjury or Subornation of Perjury

United States v. Sinclair, 109 F.3d 1527 (10th Cir. 1997). The district court did not err in assessing a three-point upward adjustment of the defendant's offense level pursuant to §2J1.3(b)(2) for substantial interference with the administration of justice. The guideline establishes a base offense level of 12 for convictions for perjury or subordination of perjury. The defendant argued that the government failed to establish that his perjured testimony caused an unnecessary expenditure of substantial government or court resources. The Tenth Circuit, having not yet construed the meaning of the phrase "unnecessary expenditure of substantial government or court resources," relied on decisions by other circuits for guidance. The circuit court noted that expenses associated with the underlying perjury offense should not form the basis for an upward adjustment. United States v. Duran, 41 F.3d 540, 546 (9th Cir. 1990). Additionally, the Eleventh Circuit has held that pre-perjury investigative efforts should not be used as a basis of enhancement because the waste of resources did not result from the offense. The court initially found that the reasoning of the presentence report and the court's time and resources in trying the defendant on that offense could not be used to support a §2J3.1(b)(2) upward adjustment. However, the court ultimately relied on the Seventh Circuit decision in United States v. Jones, 900 F.2d 512, 522 (2d Cir. 1990), where the court concluded that substantial interference with the administration of justice may be inferred if the defendant concealed information of which he is the only known source. In the instant case, the district court had made a specific finding that the perjured testimony offered by the defendant at the trial was the cornerstone of the defense and lead to additional false testimony.

Part K Offenses Involving Public Safety

§2K2.4 Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

United States v. Wheeler, 230 F.3d 1194 (10th Cir. 2000). The district court did not err in sentencing the defendant in excess of the 84-month mandatory minimum. The district court did err in the method used to determine the sentence imposed beyond the mandatory minimum. The defendant pled guilty to brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) but not to the underlying offense of robbery. At sentencing the district court calculated the defendant's guideline range to be 46 to 57 months. An additional 22 months were added to the seven-year minimum mandatory sentence to arrive at the defendant's 106-month sentence. On appeal, the defendant argued that the district court erred when it sentenced him to a term of imprisonment in excess of 84-month mandatory minimum. The Tenth Circuit disagreed and found that, according the court's earlier decision in United States v. Bazile, 209 F.3d 1205, 1207 (10th Cir. 2000), "a sentencing court has the power to impose a sentence greater than the statutory mandatory minimum required by § 924(c) if the 'defendant's criminal history category and offense level indicates a term higher than the minimum under the statute'." 230 F.3d at 1195-96. The court held that the defendant can be sentenced to a term in excess of 84 months but the methodology used by the district court was erroneous because the 22 months in excess of the seven-year mandatory minium was not determined based on the defendant's offense level and criminal history as required by Bazile. The defendant's sentence was vacated and remanded for resentencing.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001). The district court did not err in identifying the crime of transporting aliens as an "aggravated felony" for the purposes of a sentencing enhancement under §2L1.2(b)(1)(A). The defendant was convicted of reentry of a removed alien. At sentencing the district court increased the base offense level by 16 points under §2L1.2(b)(1)(A) due to the defendant's prior conviction for illegally transporting aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). The defendant argued that the illegal transportation of aliens did not relate to transporting aliens within the United States but only to transporting aliens across the border between Mexico and the United States. On appeal, the Tenth Circuit disagreed and found that a plain reading of 8 U.S.C. § 1103(a)(43)(N) indicates that transportation of aliens is clearly "related to" alien smuggling. The court found that each enumerated offense in § 1324(a) involved the transportation, movement, and hiding of aliens whether crossing into or within the United States. The court held that it could not be inferred that § 1101(a)(43)(N) excluded the crime of illegally transporting aliens from the definition of "aggravated felony" for the purpose of an increase in the base offense level under §2L1.2(b)(1)(A).

United States v. Valdez, 103 F.3d 95 (10th Cir. 1996). The appellate court affirmed the district court's consideration of the defendant's prior conviction for an aggravated felony in enhancing his sentence for unlawful re-entry after deportation by 12 levels. The defendant, relying on the Ninth Circuit's interpretation of §2L1.2 in United States v. Campos-Martinez, 976 F.2d 589, 592 (9th Cir. 1992), contended that 8 U.S.C. § 1326(b) states a separate offense, requiring a prior conviction for an aggravated felony to be pled in the indictment and proved at trial. The defendant argued that because the government had amended to omit references to his 1994 conviction, the district court erred in sentencing him under that subsection. The circuit court disagreed, and held that a prior conviction for an aggravated felony under the statute was a condition triggering an enhanced penalty, rather than a new offense and, therefore, the district court's calculation of the defendant's sentence was valid despite the fact that the conviction did not become final until after the defendant was deported.

CHAPTER THREE: *Adjustments*

Part B Role in the Offense

§3B1.3 Abuse of Position of Trust

United States v. Haber, 251 F.3d 881 (10th Cir. 2001). The district court did not err in applying the enhancement to defendant under §3B1.3 for misrepresenting himself as a manager of an investment firm. The defendant was convicted of mail and wire fraud. The defendant represented himself as the operating partner and manager of an investment firm and was entrusted with the supervision and management of the investment funds of his investors in Israeli operations, which he later converted for his personal use. By his own admission the defendant acknowledged that he was the "key man" in the purported business and that no one else had the connections he had

with anyone in Israel or knew how to conduct the business. On appeal the defendant challenged the application of the enhancement under §3B1.3 for abuse of position of trust, but the Tenth Circuit disagreed and affirmed the district court's decision, stating that from its review of the evidence the defendant possessed a significant degree of specialized knowledge and was in a fiduciary or personal trust relationship with the investors. *See also* United States v. Hung Viet Ma, 240 F.3d 895 (10th Cir. 2001) (holding that the district court did not err in applying the sentence enhancement provision of §3B1.3 to the defendant who was a postal employee convicted of theft of undelivered United States mail while working in that position).

United States v. Lacey, 86 F.3d 956 (10th Cir. 1996). "Participant" under §3B1.1 can include persons who are acquitted of criminal conduct for purposes of determining the defendant's role in the offense. Section 3B1.1, comment. (n.1) makes it clear that a "participant" in this context need not have been convicted of any offense.

United States v. Yarnell, 129 F.3d 1127 (10th Cir. 1997). Even if there were not five participants in a fraudulent scheme, evidence showed that such scheme was "otherwise extensive" and thus warranted a four-point enhancement under §3B1.1(c) of the sentencing guidelines. Evidence demonstrated that the defendant's role was that of an "organizer or leader"; fraud was perpetrated on an interstate basis, lasted four months, created at least 40 victims, and involved considerable planning and complex execution.

Part C Obstruction

§3C1.1 Obstruction of Justice

United States v. Chavez, 229 F.3d 946 (10th Cir. 2000). The district court did not err by imposing a two-level enhancement for obstruction based on the defendant 's perjury during her trial testimony. The defendant was convicted of conspiracy to distribute a controlled substance and aiding and abetting. On appeal the defendant argued that her testimony did not rise to the level of perjury merely because the jury and the court did not believe her. The Tenth Circuit disagreed and held that the defendant's story was "inherently unbelievable" because there was ample evidence in the record from the tape recordings referenced that the defendant expected a drug delivery at night and went out to meet the courier, a determination that completely contradicted the defendant's explanations at trial.

United States v. Gacnik, 50 F.3d 848 (10th Cir. 1995). The district court erred in applying the provisions of §3C1.1 to obstructive conduct which occurred prior to the commencement of an official investigation of the offense of conviction. The defendant conspired to illegally manufacture explosives, and his co-conspirators hid the explosives following an unrelated shooting incident. At the time they hid the explosives, the defendant was aware that the police were investigating the shooting, but he did not know that the police had received an anonymous tip about the explosives. The appellate court ruled that the clear language of §3C1.1 requires that the obstructive conduct must be undertaken during the investigation, prosecution or sentencing of the offense of conviction. In so holding, the court disagreed with the Eighth Circuit's broader reading of §3C1.1 in United States v. Dortch, 923 F.2d 629 (8th Cir. 1991). In Dortch, the Eighth Circuit ruled that although the offense of conviction may not be what initially attracts police attention, "a

defendant obstructing justice with knowledge of an investigation wholly unrelated to the offense of conviction could be found deserving of an adjustment." 50 F.3d at 852. The sentence was remanded for resentencing.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Malone, 222 F.3d 1286 (10th Cir.), *cert. denied*, 121 S. Ct. 605 (2000). The district court did not err in failing to group the U.S. Express robbery and the carjacking under §3D1.2(c). On appeal the defendant argued that because the carjacking was a specific offense characteristic of robbery under §2B3.1(b)(5), the court was required to group the offenses. The Tenth Circuit disagreed and held that the harm caused by the U.S. Express robbery was not the same as the harm caused by the carjacking. The two offenses posed threats to distinct and separate societal interests-those of the U.S. Express and those of the victim.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Prince, 204 F.3d 1021 (10th Cir.), *cert. denied*, 529 U.S. 1121 (2000). The district court did not err in considering reports of the defendant's criminal conduct in prison while awaiting sentencing when determining whether acceptance of responsibility applied. The defendant pled guilty to bank robbery and in the plea agreement the government agreed that it would not oppose a three-level reduction for acceptance of responsibility. The district court declined to apply the three-level reduction for acceptance of responsibility. On appeal, the defendant argued that the government breached the plea agreement by providing the probation department with FBI reports of his criminal conduct while he was in custody awaiting sentencing. He further argued that the district court erred in not granting the three-level acceptance reduction based on the FBI reports that the defendant stabbed a fellow prisoner because that criminal activity was unrelated to the criminal conduct for which he was convicted. The Tenth Circuit disagreed on both accounts and held that the government did not violate the plea agreement by supplying the probation department with the reports of the defendant's post-plea agreement conduct. The court further held that the guidelines do not prohibit a sentencing court from considering, in its discretion, criminal conduct unrelated to the offense of conviction in determining whether a defendant qualifies for an adjustment for acceptance of responsibility under §3E1.1. *See also* United States v. Archuletta, 231 F.3d 682, 686 (10th Cir. 2000) (holding that two-level reduction for acceptance of responsibility was precluded because the defendant obstructed justice by fleeing before her original sentencing hearing); United States v. Saffo, 227 F.3d 1260, 1271 (10th Cir. 2000) (holding that acceptance of responsibility reduction does not apply to a defendant who did not deny that she committed the acts that occurred but never admitted any culpability for those acts); United States v. Patron-Montano, 223 F.3d 1184, 1190 (10th Cir. 2000) (holding that the court can properly consider a defendant's lie about relevant conduct in evaluating the defendant's eligibility for a §3E1.1 acceptance of responsibility reduction).

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Perez de Dios, 237 F.3d 1192 (10th Cir. 2001). The district court did not err by including a prior misdemeanor conviction for driving without proof of insurance in the calculation of the defendant's criminal history. The defendant was convicted of possession with intent to distribute and attempted possession with intent to distribute cocaine. A prior misdemeanor conviction for driving without proof of insurance was counted in the calculation of the defendant's criminal history. On appeal, the defendant argued, as he did at sentencing, that this prior misdemeanor conviction was similar to a minor traffic infraction, like speeding, and thus should be excluded for criminal history purposes under §4A1.2(c)(2). On appeal the court applied to the defendant's prior misdemeanor conviction the "essential-characteristics-of-the-crime" test which compares the underlying conduct of the offenses involved. The court found, in applying this test, that the defendant's prior misdemeanor conviction did not qualify for exclusion under §4A1.2(c)(1) and thus was properly included in the defendant's criminal history calculation. The court also found that, under §4A1.2(c)(2), the superficial similarity that both offenses involve driving a car was overshadowed by the significant difference between speeding and driving without proof of insurance. Unlike the former, which is concerned with actually operating an automobile, the latter is concerned with failing to abide by regulations designed to assure that unsafe drivers are not on the road at all.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Gay, 240 F.3d 1222 (10th Cir.), *cert. denied*, No. 00-10088, 2001 WL 540963 (U.S. June 25, 2001). The district court did not err in applying the "otherwise applicable" offense level under §2D1.1 and the specified §4B1.1 Criminal History Category VI because the offense level under the §2D1.1 was greater than the defendant's career criminal offense level. On appeal the defendant argued that the §4B1.1's "'career offender provision must be applied in total, or not at all'." *Id*. at 1230. He further argued that the district court may only apply the specified §4B1.1 Criminal History Category VI if that court also uses the listed career offender offense level . The Tenth Circuit disagreed and held that the reference under §4B1.1 to the application of Criminal History Category VI to "every case" should be interpreted to mean that the sentencing court must employ Category VI regardless of which offense level is applied. *Id*. at 1232.

§4B1.4 Armed Career Criminal

United States v. McMahon, 91 F.3d 1394 (10th Cir.), *cert. denied*, 117 S. Ct. 533 (1996). In an issue of first impression for the appellate courts, the district court did not err in enhancing the defendant's sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA). The defendant claimed that his 1981 state conviction for distributing eight ounces of marijuana is not a "serious drug offense" for purposes of serving as a predicate offense for the ACCA enhancement.

For a state law conviction to qualify as a "serious drug offense" under 924(e), it must carry a maximum term of imprisonment of ten years or more. The Oklahoma statute the defendant was convicted of violating carries a maximum of ten years imprisonment. The defendant asserts, however, that to ensure equality in sentencing under the ACCA, his state offense should be treated the same as the most analogous federal offense, in this case 21 U.S.C. § 841(b)(1)(D), which carries a five-year maximum sentence for the same offense. The circuit court noted that the categorical approach to determine predicate offenses, which looks to the statutory definition of the offense, has been endorsed by the Supreme Court in Taylor v. United States, 495 U.S. 575, 588-92 (1990). Because the Oklahoma statute satisfies the requirement of carrying a maximum of ten-year prison sentence or more, the district court's use of the state sentence as a predicate offense was affirmed.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.1 Safety Valve

United States v. Saffo, 227 F.3d 1260, 1273 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1608 (2001). The appellate court held that a sentence under §§2D1.11 and 2S1.1 does not make the defendant eligible for the safety valve reduction under §2D1.1.

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Hallum, 103 F.3d 87 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1710 (1997). The district court did not err in determining that the defendant did not meet the requirement set forth in §5C1.2(2) that "the defendant did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense." The defendant and two codefendants were arrested as they carried 15 pounds of marijuana to their vehicles parked 200 to 300 yards away. In one of the vehicles Forest Service officers found a .22 rifle, which the defendant asserted was for shooting snakes in that area. The defendant stated that he neither had the intent to use the weapon against another person, nor would he have wanted to. Consequently, the defendant contended that the weapon was not possessed "in connection with the offense." Noting that the weapon was accessible to the defendant, the defendant was carrying the marijuana to the location of the weapon, and that if the defendant feared the presence of snakes he would have carried the weapon with him, the district court found that it was not "clearly improbable that the weapon was possessed in connection" with the drug offense and, therefore, the defendant was ineligible for the safety valve. The defendant contends that the burden is on the government to prove, by a preponderance of the evidence, the connection element of §5C1.2(2). The defendant further asserts that the "possess" element of §5C1.2 should be analogized to the "use" language of §924(c)(1) as interpreted in Bailey v. United States, 116 S. Ct. 501 (1995), to require the government to show "active employment of the firearm in relation to the underlying offense." 103 F.3d at 89. The Circuit court rejected this argument stating that the court had recently held that the defendant bears the burden of proving eligibility for the safety valve. United States v. Verners, 103 F.3d 108 (10th Cir. 1996). The Circuit Court also stated that in Bailey the Supreme Court

found that "use" constituted more than just "possession" of a weapon. The Circuit court held that the proximity of the firearm to the underlying offense and the "potential to facilitate the offense" was enough to prevent application of the safety valve provision. *Id*.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Guthrie, 64 F.3d 1510 (10th Cir. 1995). The district court erred in its calculation of restitution. The defendant pled guilty to providing prohibited kickbacks from the proceeds of a government contract. He was sentenced to five years probation, including six months home confinement and 250 hours of community service, $27,600 in restitution and a $50 special assessment. On appeal, the defendant argued that he was entitled to offset the amount of restitution by the value of services he allegedly performed under the government contract. The circuit court ruled that the district court applied the wrong standard for determining the amount of restitution by ordering restitution without determining the losses sustained by the victim and agreed with the defendant's argument that the determination of the amount of loss must account for any benefit received by the victim. The circuit court further held that the district court had erred in including in the amount of restitution losses stemming from counts of the indictment to which the defendant did not plead guilty.

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. McCary, 58 F.3d 521 (10th Cir. 1995). The case was remanded for resentencing a second time, in order for the district court to impose the 17-month enhancement portion of the subsequent 63-month Oklahoma federal sentence to run consecutively to the 211-month Texas federal sentence. The government, on cross-appeal, asserted that the 17-month portion of the sentence, which was designated as an enhancement to sanction the conduct for occurring while the defendant was released on bond, should have been imposed to run consecutively because it was governed by 18 U.S.C. § 3147. The appellate court agreed and held that "the more general provisions of §5G1.3(b), even if otherwise applicable, must be limited in the circumstances of this case by the more specific provisions of 18 U.S.C. § 3147 and §2J1.7." *Id*. at 523.

United States v. Yates, 58 F.3d 542 (10th Cir. 1995). The appellate court upheld the district court's determination that the court may use the "real or effective" state imprisonment term, rather than the nominal term of imprisonment imposed, in applying §5G1.3 to achieve a reasonable incremental increase in punishment. However, the district court committed clear error in making an assumption of what the effective state sentence would be, without an evidentiary basis. The court applied §5G1.3(c), and imposed a consecutive sentence, based on its opinion that the defendant would serve 12 years of an 18 year state sentence. Although the defense counsel suggested that the actual time served may be 9 to 12 years of an 18-year sentence, the defendant did not stipulate to this fact, nor did he concede that such would be the case, nor did the

government obtain evidence from any state sources. On remand for resentencing, the district court may hold a hearing to obtain the evidence. The appellate court also noted that "under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, the guidelines must control over the wishes expressed in the order of the state court judge" that the sentence be served concurrently with the federal sentence. *Id*. at 550.

Part K Departures

§5K2.0 Grounds for Departure (Policy Statement)

United States v. Fortier, 242 F.3d 1224 (10th Cir. 2001). The district court did not err in imposing a 13-level upward departure[3] for the harm resulting from the bombings under various provisions of the Guidelines, based on the defendant's knowledge of the possible consequences of his actions, even though the defendant was not a bombing co-conspirator. The defendant pled guilty to several offenses resulting from his involvement with codefendants prior to the Oklahoma City bombing of 1995. The defendant appealed his original sentence, and the court vacated and remanded it for resentencing. On remand, the defendant was sentenced to an identical prison term and a reduced fine. On appeal, the defendant argued that the district court judge's imposition of the second sentence was vindictive and that the district court erred in applying an upward departure. On appeal, the Tenth Circuit made no finding of vindictiveness and found that there was a sufficient nexus between the defendant's admitted wrongdoing and the Oklahoma City bombing to permit an upward departure even though the defendant was not charged as a co-conspirator. The court held that the defendant bears sufficient legal responsibility for the bombing to support an upward departure. *See* United States v. Benally, 215 F.3d 1068, 1078 (10th Cir. 2000) (combining the legally impermissible and factually inappropriate grounds for departure cannot make a case one of the extremely rare cases contemplated by §5K2.0 enough to warrant a downward departure).

United States v. Armenta-Castro, 227 F.3d 1255 (10th Cir. 2000). The district court did not err in rejecting the defendant's request for a downward departure based on sentencing disparity. The defendant pled guilty to illegally reentering after a prior deportation. As part of the plea agreement the defendant admitted his prior deportation was subsequent to an aggravated felony conviction and that he was subject to enhanced penalties set out in § 1326(b)(2)(B). The defendant requested a downward departure based on sentencing disparity that existed among federal districts with respect to illegal reentry cases. On appeal, the court, consistent with United States v. Banuelos-Rodriguez, 215 F. 3d 969, 978 (9th Cir. 2000) (en banc), held that a district court may not grant a downward departure from an otherwise applicable Guideline sentencing range on the ground that, had the defendant been prosecuted in another federal district, the

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[3] *Id*. at 1227. The defendant's upward departures were based on several Sentencing Guidelines sections: §5K2.1 (multiple deaths); §5K2.2 (significant physical injury); §5K2.3 (extreme psychological injury); §5K2.5 (property damage); §5K2.7 (disruption of governmental functions); and §5K2.14 (endangerment of public health and safety). Another factor taking the case out of the 1994 Guidelines heartland was the absence of the current terrorism guideline §3A1.4 from the 1994 version of the Guidelines applicable to the defendant's case.

defendant may have benefitted from the charging or plea-bargaining policies of the United States Attorney in that district.

United States v. Contreras, 108 F.3d 1255 (10th Cir.), *cert. denied*, 522 U.S. 839 (1997). The district court erred departing downward to avoid an unwarranted disparity of sentences with her co-defendant. The government appealed asserting that the defendant was not "similarly situated" with her codefendant and, therefore, did not warrant similar sentences. Noting a previous circuit court decision, the court stated that "`while similar offenders engaged in similar conduct should be sentenced equivalently, disparate sentences are allowed where the disparity is explicable by the facts on the record.'" *Id*. at 1271 (*quoting* United States v. Goddard, 929 F.2d 546, 550 (10th Cir. 1991)). In the present case, the codefendants are not similarly situated and, therefore, the district court abused its discretion in finding an "unwarranted disparity." The defendant was convicted of conspiracy to possess with intent to distribute, investment of illicit drug profits, and two counts of money laundering; and her codefendant pled guilty to possession with intent to distribute marijuana and accepted responsibility for her criminal conduct. The defendant asserts that she was willing to plead guilty, but, she was not offered a plea agreement. The circuit court rejected this line of reasoning stating that a sentence may not be reduced merely because a codefendant engaging in similar conduct received a shorter sentence by means of a plea agreement. To do so would undermine the prosecutorial discretion of United States attorneys and could cause the government to limit its use of plea bargains in multiple defendant cases in the future. Consequently, the circuit court held that the departure was in error.

United States v. Lowe, 106 F.3d 1498 (10th Cir.), *cert. denied*, 117 S. Ct. 2494 (1997). The district court did not err in departing above Criminal History Category VI in sentencing the defendant. Although such action should rarely be undertaken, it is within the judge's discretion to make such a departure. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider the nature of the prior offenses, rather than simply their number, as more indicative of the seriousness of the defendant's criminal record. Because the purpose of the career offender provision is to sentence defendants at or near the statutory maximum, it is permissible to depart upward from Criminal History Category VI when the defendant is also a career offender. In this particular case, the court departed upward based on three considerations independent of the defendant's status as a career offender, including: 1) offenses that were not included in his characterization as a career offender because they were outside of the applicable time period; 2) prior violent offenses that were not counted because they were consolidated for sentencing; and 3) the similarity between the defendant's "criminal past" and the instant offense.

United States v. Maden, 114 F.3d 155 (10th Cir. 1997). The district court could not appropriately depart downward from the defendant's guideline range based on the length of the sentence previously approved for the codefendant. The codefendant had entered a plea to a lesser charge, his criminal history was much less extensive than the defendant's, and the defendant was more highly placed in drug distributorship than was the codefendant. Thus, disparity in sentences of the defendant and codefendant was explicable by facts before the court. The Tenth Circuit did not categorically state here that disparate sentences among codefendants could never constitute a basis for downward departure.

§5K2.13 Diminished Capacity

United States v. Mitchell, 113 F.3d 1528 (10th Cir. 1997). The district court could not appropriately depart downward when it had found as a fact that the defendant's incarceration was necessary to protect the public. Downward departures for diminished capacity under §5K2.13 are permitted only if the defendant's "criminal history does not indicate a need for incarceration to protect the public." Because the court had made a factual finding that the defendant constituted a threat to the public, departure under §5K2.13 was foreclosed. Thus, the sentence of 210 months incarceration was upheld.

United States v. Webb, 49 F.3d 636 (10th Cir.), *cert. denied*, 116 S. Ct. 121 (1995). The district court erred in granting the defendant a downward departure based on the defendant's psychiatric condition, his family circumstances, and the unsophisticated nature of his crime. It was improper to depart downward based on the defendant's psychiatric condition because the defendant's psychiatric reports did not address or conclude that the defendant suffered from "significantly reduced mental capacity" as required by §5K2.13. In addition, the defendant's role as sole caretaker of his child is not extraordinary; therefore, this factor cannot justify a departure under §5H1.6. Lastly, although the defendant's silencer was composed of a toilet paper tube loaded with stuffed animals, the unsophisticated nature of the silencer cannot justify a downward departure. The departure was reversed and the case was remanded for resentencing within the guideline range.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

United States v. Jones, 80 F.3d 436 (10th Cir.), *cert. denied*, 117 S. Ct. 139 (1996). The district court did not err in its adoption of the sentencing guideline calculations recommended in the presentencing report. The defendant waived the statutory minimum period for review of the report when he failed to object at the sentencing hearing. The defendant maintained that he should be resentenced because the district court failed to allow him ample time prior to the hearing to properly review the presentencing report with his attorney. Under Rule 32(b)(6)(A) of the Federal Rules of Criminal Procedure, a defendant is given no less than 35 days in which the probation officer must furnish the presentence report to the defendant and the defendant's counsel for review. The appellate court joined the Fifth, Seventh, and Ninth Circuits in concluding that by participating in a sentencing hearing without objection, the minimum period provided by Rule 32(b)(6)(A) was automatically waived.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.4 Term of Imprisonment

United States v. Burdex, 100 F.3d 882 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1283 (1997). In an issue of first impression, the Tenth Circuit joined the Third, Fourth, Fifth and Eleventh Circuits in holding that the sentencing court need not give notice before departing upward from a sentencing range recommended by the policy statements of Chapter 7. *See* United States v. Blackston, 940 F.2d 877, 893 (3d Cir.) (stating that when dealing with policy statements, the court need not find an aggravating factor warranting an upward departure in order to sentence out of the prescribed range), *cert. denied*, 502 U.S. 992 (1991); United States v. Davis, 53 F.3d 638, 642 n. 15 (4th Cir. 1995) (quoting Mathena for proposition that deviating from Chapter 7 is not equivalent to departure warranting notice); United States v. Mathena, 23 F.3d 87, 93 n. 13 (5th Cir. 1994) (stating that diverging from "advisory policy statements is not a departure such that a court has to provide notice"); United States v. Hofierka, 83 F.3d 357 (11th Cir. 1996) ("[E]xceeding [the Chapter 7] range does not constitute a `departure'"). Upon violating the terms of his supervised release, the defendant was sentenced pursuant to Chapter 7. While the presentence report calculated the range of imprisonment at 8-14 months under the Chapter 7 policy statements, the sentencing court found that the recommended range did not adequately address the "gravity of the defendant's past criminal conduct," and departed upward to a 24-month sentence. The defendant asserted that the sentencing court erred in failing to notify defendant of its intent to depart upward from the policy statements in Chapter 7. The defendant relied upon the general proposition that defendants are entitled reasonable notice of the court's intent to depart from the guideline range based upon a "ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government." Burns v. United States, 501 U.S. 129,

137 (1991). The Circuit court adopted the position of the Third, Fourth, Fifth and Eleventh Circuits that those policy statements are not binding on the sentencing court, thus, a departure from a Chapter 7 range is not a "departure" from a binding guideline.

United States v. Hurst, 78 F.3d 482 (10th Cir. 1996). The district court did not err in imposing a sentence in excess of the range recommended in §7B1.4. After violating a condition of his supervised release, the defendant was sentenced to the statutory maximum of 24 months imprisonment rather than the recommended range under §7B1.4 of between four to ten months. The defendant argued that in light of the Supreme Court's decisions in Stinson v. United States, 508 U.S. 36 (1993), and Williams v. United States, 503 U.S. 193 (1992), policy statements are authoritative and binding. The circuit court noted that every circuit court that has considered the impact of Stinson and Williams on §7B1.4 has concluded that it is only advisory and not binding. In Stinson, the Supreme Court held that a policy statement "that interprets or explains a guideline is authoritative." 508 U.S. at 38. However, all of the circuit courts that have considered the impact of Stinson and Williams have concluded that the "policy statements of Chapter 7 do not interpret or explain a guideline." 78 F.3d at 484. *See* United States v. Davis, 53 F.3d 638 (4th Cir. 1995); United States v. Milano, 32 F.3d 1499 (11th Cir. 1994); United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994); United States v. Anderson, 15 F.3d 278 (2d Cir. 1994); United States v. O'Neill, 11 F.3d 292 (1st Cir. 1993); United States v. Levi, 2 F.3d 842 (8th Cir. 1993); United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993); United States v. Hill, 48 F.3d 228 (7th Cir. 1995). In addition, unlike the policy statement at issue in Williams, the policy statements regarding revocation of supervised release are advisory rather than mandatory in nature. The court held that if a district court imposes a sentence in excess of that recommended in Chapter 7, it will only be reversed if its decision was not reasoned and reasonable.

Post-*Apprendi*

United States v. Jackson, 240 F.3d 1245 (10th Cir. 2001). The district court erred by imposing a term of imprisonment appropriate for offenses involving at least 50 grams of cocaine base, even though the defendant had been indicted and convicted for committing distinct offenses involving an unspecified quantity of cocaine base. The indictment failed to allege the quantity of cocaine base supporting any of the § 841(a) distribution and possession counts thus the maximum sentence that the defendant could receive under § 841(b)(1)(C) for distribution and possession with intent to distribute an unspeci fied quantity of crack cocaine was 20 years. The defendant was sentenced to 30 years, in excess of the 20-year maximum. On appeal, the defendant argued that Apprendi was violated because: 1) the sentence imposed exceeded the statutory maximum for the offense alleged in the indictment; 2) the district court refused the defendant's proposed jury instruction and special verdict form relating to drug type and quantity; and 3) the four-level role enhancement in the Guidelines was overruled by Apprendi. The court, citing United States v. Jones, 235 F.3d 1231 (10th Cir. 2000), found that Jones controlled the defendant's case and required that her sentence be reversed and remanded for resentencing because her sentence of 30 years exceeded the 20-year maximum. It further found that because the defendant stipulated to a quantity of crack cocaine at trial sufficient to support a sentence of up to 40 years under 21 U.S.C. § 841(b)(1)(B), the drug type and quantity were no longer facts required to be determined by the jury. Finally the court found that Apprendi did not overrule the Federal Sentencing Guidelines

because the U.S. Supreme Court specifically stated in Apprendi that "the Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held." *Id*. at 1249.

United States v. Thompson, 237 F.3d 1258 (10th Cir.), *cert. denied*, 121 S. Ct. 1637 2001). The defendant was convicted of distribution of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(C) and sentenced to 121 months imprisonment and 60 months supervised release. The defendant challenged his sentence on the grounds that the indictment was insufficient in failing to state a specific drug quantity and the supervised release term imposed exceeded the minimum statutory range. The court found that the indictment was legally sufficient and that the defendant's sentence fell within the minimum statutory range set forth in 21 U.S.C. § 841(b)(1)(C). Further the court held that the imposition of a five-year term of supervised release was not in violation of Apprendi because it fell within the minimum term of supervised release under § 841(b)(1)(C) and within the sentencing guidelines authorizing a term of supervised release within a range of three to five years under §5D1.2.

United States v. Jones, 235 F.3d 1231 (10th Cir. 2000). The defendant was convicted of two counts of distribution of crack cocaine on two occasions in violation of 21 U.S.C. § 841(b). The drug quantity was not alleged in the indictment and the authorized statutory maximum was 20 years. At sentencing the court concluded that defendant's drug quantity was 165.6 grams of crack cocaine which would require defendant to be sentenced under 21 U.S.C. § 841(b)(1)(A), authorizing a maximum term of life imprisonment. The defendant's sentence was 360 months on both counts to be served concurrently, followed by five years of supervised release. In this second appeal by the defendant,[4] the defendant challenged the legitimacy of his sentence in light of *Apprendi* and argued that the quantity of drugs attributed to him should have been alleged in the indictment. The U.S. Supreme Court remanded the case for resentencing in light of *Apprendi*. The Tenth Circuit held that a district court may not impose a sentence in excess of the maximum set forth in 21 U.S.C. § 841(b)(1)(C) unless the benchmark quantity of cocaine base for an enhanced penalty is alleged in the indictment in addition to being submitted to the jury and proven beyond a reasonable doubt. *See also* United States v. Heckard, 238 F.3d 1222 (10th Cir. 2001) (holding that the district court did not err in considering drug amount as an aggravating or mitigating factor in establishing the defendant's offense level under the Sentencing Guidelines because the drug quantity finding only increased the defendant's offense level and not the maximum sentence). *See also* United States v. Hishaw, 235 F.3d 565, 576 (10th Cir. 2000) (holding that, under the Apprendi standard, the district court did not err in considering drug quantities beyond the offense of conviction as long as the defendant's sentence falls within the maximum established by statute); United States v. Keeling, 235 F.3d 533, 539 (10th Cir. 2000) (where the jury has not found quantity beyond a reasonable doubt and quantity is integral to punishment, a defendant can demonstrate prejudice if the evidence suggests a reasonable doubt on quantity).

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[4] *See* Jones v. United States, 194 F. 3d 1178, 1183-86 (10th Cir. 1999)(the court opined that the Supreme Court's holding in Jones v. United States, 526 U.S. 227 (1999) (the carjacking case which held that death and serious bodily injury are not sentencing factors but are elements of the offense), merely suggested rather than established a constitutional requirement to submit to the jury any factor the increases the maximum statutory penalty).